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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 572

JAMES LOUIS GIROUARD,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR PETITIONER

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	3
Specification of errors to be urged	6
Summary of argument	7
Argument	9
I. Expression of willingness to bear arms is not a condition upon the right to naturalization	9
a. The oath of allegiance prescribed in the Nationality Act of 1940, as amended, includes no requirement barring from naturalization those who by reason of religious scruples alone are unwilling to bear arms in the defense of the country	11
b. The statutory requirement that the applicant establish that he is "attached to the principles of the Constitution" does not justify exaction of a promise to bear arms	18
c. Amendatory legislation in 1942 makes plain the intention of Congress that statement of willingness to bear arms is not required as a condition of naturalization under the Nationality Act of 1940	23
II. Prior decisions of this Court to the extent that they are not clearly distinguishable should be reconsidered and overruled	28
Conclusion	34

CITATIONS

Cases:

Billings v. *Truesdell*, 321 U. S. 542	21
Board of Education v. *Barnette*, 319 U. S. 624	20

	Page
Blair v. *Chicago*, 201 U. S. 400	27
Cantwell v. *Connecticut*, 310 U. S. 296	20
Dunne v. *United States*, 138 F. (2d) 137	8, 18, 20
Helvering v. *Griffiths*, 318 U. S. 371	34
Hirabayashi v. *United States*, 230 U. S. 81	8, 20
In re Bevelacqua, 295 Fed. 862	19
In re Kinloch, 53 F. Supp. 521	6, 21, 24
In re Levy, 278 Fed. 621	19
In re Nielsen, 60 F. Supp. 240 (D. C. 1945)	13, 25
In re Saralieff, 59 F. (2d) 436	19
In re Sawyer, 59 F. Supp. 428 (Del. 1945)	24
In re Shanin, 278 Fed. 739	19
In re Siem, 284 Fed. 868	19
In re Summers, 325 U. S. 561	28
In re Van Lacken, 22 F. Supp. 145	19
Jacobson v. *Massachusetts*, 197 U. S. 11	21
Kauten v. *United States*, 133 F. 2nd 703	33
McCulloch v. *Maryland*, 4 Wheat. 316	20
Pampanga Mills v. *Trinidad*, 279 U. S. 211	27
Prince v. *Massachusetts*, 321 U. S. 158	20
Schneider v. *Irvington*, 308 U. S. 147	20
Schneiderman v. *United States*, 320 U. S. 118	7, 8, 19, 21
United States v. *Bland*, 283 U. S. 636	3, 6, 9, 10, 33
United States v. *Cooper Corp.*, 312 U. S. 600	27
United States v. *La Franca*, 282 U. S. 568	37
United States v. *Macintosh*, 283 U. S. 605	3, 6, 8, 9, 10, 21, 31
United States v. *Rovin*, 12 F. 2d 942	19
United States v. *Schwimmer*, 279 U. S. 644	3, 6, 8, 9, 10, 29

Statutes and Miscellaneous:

Act of March 26, 1790, 1 Stat. 103	13
Act of May 8, 1792, c. 33, sec. 2, 1 Stat. 271	15
Act of January 29, 1795, c. 20, 1 Stat. 414	13, 19
Act of February 24, 1864, c. 13, sec. 17, 13 Stat. 6	16
Act of January 21, 1903, c. 196, sec. 2, 32 Stat. 775	16
Act of June 29, 1906, c. 3592, 35 Stat. 596 (Naturalization Act of 1906)	9
Sec. 4 (3d) (4th)	3
Sec. 28	9

	Page
Act of June 3, 1916, c. 134, sec. 59, 39 Stat. 166	16
Act of May 18, 1917, c. 15, sec. 4, 40 Stat. 76	17, 33
Act of March 2, 1929, c. 546, sec. 8, 45 Stat. 1515	9
Act of September 16, 1940, c. 720, sec. 5(g), 54 Stat. 885 (Selective Training and Service Act of 1940)	17
Act of October 14, 1940, c. 876, 54 Stat. 1137 (Nationality Act of 1940)	3
Sec. 307(a)	2, 10, 35
Sec. 323a	27
Sec. 335(a)	2, 3, 35
Sec. 335(b)	3, 40
Sec. 504	3
Act of March 27, 1942, c. 199, sec. 1001, 56 Stat. 176 (Second War Powers Act)	23, 36
Act of December 7, 1942, c. 690, 56 Stat. 1041	25, 38
Act of December 22, 1944, c. 662, sec. 1, 58 Stat. 886	23
Annals of Congress:	
1st Congress, Vol. 1, p. 434	15
3rd Congress, Vol. 4, pp. 1021-1022	19
13th Congress, 3d Sess. Vol. 28, pp. 774-775	15
Army Regulations, 615-500:	
¶ 13 (September 1, 1942)	13
¶ 15F (10 Aug. 1944)	13
Colonial and State Statutes	14
Cornell, The Conscientious Objector and the Law	33
Elliot's Debates:	
Vol. I, pp. 334-335; Vol. II, pp. 531; Vol. III, pp. 656-659, Vol. IV, pp. 243-244	15
Moore International Law Digest, Vol. 3, Section 381	13
Naturalization Rules and Regulations:	
January 1, 1932, Rule 8, subd. C, par. 1	9
July 1, 1929, Rule 8(c)	9
Report of the President's Committee to Revise the Nationality Laws, Part 1, p. 38	9
R. S. Sec. 1757	11
State Constitutions	14
United States Constitution, Art. VI, cl. 3	7, 11, 12

Page

5 U. S. C., Sec. 16 11

8 U. S. C.:

Sec. 707 2

Sec. 707(a) 10, 27

Sec. 723a 27

Sec. 735 3

Sec. 735(b) 10

Sec. 1001 23

10 U. S. C. Sec. 1581 13

Vattel, Law of Nations, Book III, c. 3, Secs. 28, 37, 38, 41-44 32

Wigmore and Sears, United States v. Macintosh, A Symposium, 26 Ill. L. Rev. 375 31, 33

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Opinions Below

The District Court filed no opinion. The opinion of the Circuit Court of Appeals (R. 21) and the dissenting opinion of Judge Woodbury (R. 27) are reported in 149 F. 2nd 760.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered June 1, 1945 (R. 35). By order of Mr. Justice Black August 27, 1945, the time within which to file petition for certiorari was extended to October 30, 1945 (R. 35). Peti-

tion for writ of certiorari was filed October 30, 1945, and was granted December 10, 1945 (R. 36). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

Question Presented

Whether, in view of amendments to the Nationality Act of 1940 recognizing the right of those who have served in the armed forces to naturalization despite their continuing religious scruples against bearing arms, the requirements of attachment to the principles of the Constitution and the statutory oath may be properly held to debar from naturalization an alien who acknowledges the plenary authority of Congress to declare war, who reserves to himself no right to determine the rightness of war once Congress has spoken, and who acknowledges a duty, and is willing, to serve in the armed forces of the United States in places of risk and the greatest danger, but who is, by reason of religious scruples against the taking of human life, unwilling to bear arms.

Statutes Involved

The sections of the Nationality Act of 1940, October 14, 1940, c. 876, 54 Stat. 1137 and amendments thereto herein involved are printed in the Appendix, p. 35. The pertinent portions thereof provide:

> Section. 307 (a) No person, except as hereinafter provided in this chapter, shall be naturalized unless such petitioner * * * (3) during all the periods referred to in this subsection has been and still is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States * * * [8 U. S. C. sec. 707].
>
> Sec. 335 (a) A person who has petitioned for naturalization shall, before being admitted to citizenship, take an oath in open court * * * (3) to support and defend the Constitution and the laws of the United States

against all enemies, foreign and domestic, and (4) to bear true faith and allegiance to the same. * * *

(b) The oath prescribed by sub-section (a) of this section which the petitioner for naturalization is required to take shall be in the following form: "I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constition and laws of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I take this obligation freely without any mental reservation or purpose of evasion. [8 U. S. C. sec. 735].[1]

Statement

The petitioner, a native of Canada, entered this country in 1923 and has resided here ever since (R. 4-5). On August

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[1] The pertinent provisions of the Naturalization Act of 1906, Section 4, subdivision Third and Fourth, considered in *United States* v. *Schwimmer*, 279 U. S. 644; *United States* v. *Macintosh*, 283 U. S. 605; *United States* v. *Bland*, 283 U. S. 636 merely prescribed (34 Stat. 596, 497-598):

(Third) The applicant shall declare on oath—

"that he will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same."

(Fourth) It shall be made to appear that for at least five years preceding the application—

"he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the same."

Sec. 504 of the Nationality Act of 1940, Act of October 14, 1940, c. 876, 54 Stat. 1137, 1172, "to revise and codify the nationality laws of the United States into a comprehensive nationality code" repealed the pertinent portions of Section 4 of the Naturalization Act of 1906; but the Nationality Act of 1940 in prescribing the content of the oath of allegiance, sec. 335(a), in substance reenacted Section 4 (Third) of the Naturalization Act of 1906, 34 Stat. 596, 597-598, and in specifying for the first time the precise wording of the oath Section 335(b) adopted the language theretofore prescribed by administrative regulation of the Bureau of Naturalization. The requirement as to showing that the applicant is "of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States" (Sec. 307(a)) was taken almost verbatim from Section 4 (Fourth) of the Naturalization Act of 1906, 34 Stat. 596. The statutory language under consideration in the *Schwimmer*, *Macintosh* and *Bland* cases is in substance identical with that involved in the instant case.

8, 1940, he filed a declaration of intention to become a citizen of the United States (R. 1) and on November 3, 1943, he filed in the United States District Court for the District of Massachusetts his petition for naturalization (R. 7).

Petitioner stated in the Application for a Certificate of Arrival and Preliminary Form for Petition for Naturalization filed by him January 26, 1943 (R. 3), that he understood the principles of the government of the United States, believed in its form of government and was willing to take the oath of allegiance in the following form (R. 5-6):

> "I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which I have hertofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I take this obligation freely without any mental reservation or purpose of evasion: So help me God."

Question 26 in the Preliminary Form and the petitioner's answer thereto were (R. 6):

> "If necessary, are you willing to take up arms in defense of the country? No (Non-combatant) Seventh Day Adventist."

In sworn testimony before the acting naturalization examiner on March 9, 1943, the petitioner explained the above answer to questions 26 by saying (R. 15):

> * * * it is purely a religious matter with me, I have no political or personal reasons other than that.

At a hearing held before the district court on August 1, 1944 and on interrogation by the district court judge, the petitioner testified that he was a member of the Seventh Day Adventist Denomination of whom approximately 10,000 were then serving in the armed forces of the United States

as non-combatants, especially in the Medical Corps; and that he was willing to serve in the army but would not bear arms (R. 14, 19).[2]

Disregarding the recommendation of the naturalization examiner that the petition be denied, the district court ruled (R. 19):

> That since the Selective Service and Training Act permits, as a matter of right, an applicant for the draft to express a willingness to serve in the armed forces of the United States, but as a non-combatant, then this petitioner by exercising that right is still a person who can take an unqualified oath of allegiance to the United States, and is therefore eligible to citizenship.

On August 1, 1944, the court accordingly entered its order directing that the petitioner be admitted to citizenship (R. 11-12).

At the same term, on August 25, 1944, a representative of the United States Immigration and Naturalization Service filed a notice of exception (R. 14). From the order of

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[2] In an inquiry form transmitted November 3, 1943 by the Naturalization Service and returned by the clerk of the petitioner's draft board there appears the statement (R. 17): "* * * that in Series X, page 6, the registrant did claim exemption from combatant or noncombatant military service as a conscientious objector; that if he did so claim, he has filed with this Board a 'Special Form for Conscientious Objectors (Form 47) * * *'." The equivocal form of this questionnaire makes it pertinent to note that Series X of the Selective Service Questionnaire merely reads as follows:

> "SERIES X—CONSCIENTIOUS OBJECTION TO WAR
>
> *Instructions:* Any registrant who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form shall sign the statement below requesting a Special Form for Conscientious Objector (Form 47) from the local board which must be completed and returned to the local board for consideration.
>
> By reason of religious training and belief I am conscientiously opposed to war in any form and for this reason request that the local board furnish me a Special Form for Conscientious Objector (Form 47) which I am to complete and return to the local board.
>
> (Signature)"

Form 47 as completed by petitioner was not in evidence.

Court admitting petitioner to citizenship, entered on August 1, 1944, the United States appealed (R. 18).

The opinion of the circuit court of appeals held the case controlled by *United States* v. *Schwimmer*, 279 U. S. 644 (1929); *United States* v. *Macintosh*, 283 U. S. 605 (1931); *United States* v. *Bland*, 283 U. S. 636 (1931), and that under those decisions the statutory oath of allegiance can not be taken by a person who, while willing unqualifiedly to do all else in defense of the country including service in the military forces, is unwilling actually to bear arms in its defense (R. 21-27). The dissenting opinion of Judge Woodbury (R. 27-34) asserted that by the amendment of March 27, 1942, 56 Stat. 182, 183, Congress, although it did not change the section of the Nationality Act prescribing the oath, nevertheless evidenced a change in the interpretation placed upon the oath by this court (*In re Kinloch*, 53 F. Supp. 521 (W. D. Wash. 1944)) and the majority recognized that to give the amendment any meaning it must be interpreted as permitting conscientious objectors who are veterans to take the oath despite their religious scruples against bearing arms (R. 26-27). The dissenting opinion also pointed out that Congress should not be deemed to have intended to have the words of the same oath mean one thing to a conscientious objector who has served in the military forces and something else to one who is willing so to serve (R. 29). And the dissent concluded that the district court judgment should be affirmed on another ground as well: That the *Schwimmer*, *Macintosh* and *Bland* cases are no longer the law.

Accordingly the Circuit Court of Appeals by a 2-1 vote reversed the judgment of the district court (R. 35).

Specification of Errors to Be Urged

The Circuit Court of Appeals erred:

1. In holding that the oath of allegiance prescribed in the Nationality Act of 1940 as amended impliedly requires willingness to bear arms as a condition to naturalization.

2. In failing to hold that the 1942 amendments to the Nationality Act of 1940 negative any implied requirement of willingness to bear arms as a condition to naturalization.

3. In holding that the statutory requirements for naturalization were not satisfied because of petitioner's statement of his unwillingness to bear arms.

Summary of Argument

Expression of willingness to bear arms is not a condition upon the right to naturalization.

Although the power of Congress to compel military service is unquestioned as a principle of the Constitution, there is no express statutory provision in the Nationality Act of 1940 requiring statement by the applicant of willingness to bear arms. The oath required of civil officers is substantially the same in form but it has never been, and reasonably could not be, construed to include a promise to bear arms, particularly in view of the inhibition against religious tests as a qualification for office (Art. VI, cl. 3). The policy of granting exemption from combatant service to those having religious scruples against the actual bearing of arms has been recognized since colonial days and by the Congress up to the present time. In the light of this uniform policy of Congress evidencing the theory and practice of the Government in balancing the war power and the right of freedom of conscience, the oath of allegiance cannot by mere implication be read as requiring expression of willingness to bear arms despite religious scruples of the applicant.

The statutory requirement that the applicant be "attached to the principles of the Constitution" by its very generality indicates that Congress intended no rigid rule of precise definition. *Schneiderman* v. *United States*, 320 U. S. 118, 139. It has generally been construed to mean that the alien must be attached to the principles of free Government and the general political philosophy embodied therein. But the Fifth Amendment and the many amendments since made

refute the idea that attachment to any particular provision is essential to satisfy the naturalization requirements. The validity of any future draft law in derogation of religious liberty must depend upon all the conditions obtaining at the time of its passage since religious liberty may be infringed, if at all, to no greater extent than is necessary to preserve the life of the State. *Hirabayashi* v. *United States*, 320 U. S. 81, 99; *Dunne* v. *United States*, 138 F. 2d 137, 141. Thus far, Congress has found recognition of the religious liberty here asserted to be consonant with the efficacious exercise of the war power. And the theory and practice of the Congress in relation to freed of conscience thus exemplified is the guide for construction of the phrase "attached to the principles of the Constitution." *United States* v. *Macintosh* (dis.), 283 U. S. 605, 635; *Schneiderman* v. *United States*, 320 U. S. 118, 132, 135. The willingness of the applicant to serve in the military arm in any capacity establishes his willingness to assume equality of risk in defense of the country as a concomitant of the privilege of United States citizenship.

By two separate amendments in 1942 of the Nationality Act of 1940, each of which amendment clearly recognized the right of war veterans to naturalization despite continuing religious scruples against bearing arms, the Congress has now made clear that the oath of allegiance and the requirement that the applicant be "attached to the principles of the Constitution" do not impliedly—as they never have expressly—require expression of a willingness to bear arms as a condition to naturalization.

On the facts, the instant case is clearly distinguishable from *United States* v. *Schwimmer*, 279 U. S. 644, and *United States* v. *Macintosh*, 283 U. S. 605, insofar as they may be deemed otherwise controlling. The decision in *United States* v. *Bland*, 283 U. S. 636, should be reconsidered and overruled in the light of the subsequent Congressional enactments.

ARGUMENT

The question in this case is very narrow. It is undisputed that naturalization is a privilege that may be granted or withheld at the sole discretion of the Congress. The petitioner also recognizes that Congress has power to fix such conditions as it may deem appropriate to the grant of the privilege, including exaction of a promise to bear arms. And it is recognized that Congress may, in its discretion, compel service in the army in time of war.

The question presented is much narrower:

Has the Congress by implication prescribed that as a condition to naturalization, the applicant shall expressly promise to bear arms?

I.

Expression of Willingness to Bear Arms Is Not a Condition Upon the Right to Naturalization

The Nationality Act of 1940, Sec. 335(b) above quoted specifically prescribes the form of oath in words different[3] but in substance the same as the form of oath prescribed in the Rules and Regulations of July 1, 1929, Rule 8(c), promulgated by the Commissioner of Naturalization under authority of section 28 of the Act of June 29, 1906, c. 3592, 34 Stat. 606 as amended by the Act of March 2, 1929, c. 536, sec. 8, 45 Stat. 1515 and under consideration in *United States* v. *Schwimmer*, 279 U. S. 644, *United States* v. *Macintosh*, 283 U. S. 605 and *United States* v. *Bland*, 283 U. S. 636:

> I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state or sovereignty, and particularly to ....., to whom I have

[3] The form of oath prescribed by the Nationality Act of 1940 is the same as that prescribed in the Naturalization Regulations of January 1, 1932, Rule 8, subd. C, par. 1. See Report of the President's Committee to Revise the Nationality Laws, Part 1, p. 48.

heretofore been a subject; that I will support and defend the Constitution and the laws of the United States of America against all enemies, foreign or domestic; and that I will bear true faith and allegiance to the same.

The court below held (R. 23):

> "The Supreme Court has interpreted that oath to mean that the petitioner is willing to bear arms in defense of this country and unless he takes an oath so interpreted the petition is to be dismissed and the privilege of citizenship denied."

citing *United States* v. *Schwimmer*, 279 U. S. 644; *United States* v. *Macintosh*, 283 U. S. 605; *United States* v. *Bland*, 283 U. S. 636. Here the petitioner has clearly indicated his willingness to serve in the military forces of the United States as a non-combatant, although unwilling actually to bear arms. The decision of the court below must therefore be regarded as holding that solely because the petitioner is unwilling actually to bear arms, he is ineligible for naturalization under the Nationality Act on two grounds:

(1) He is unable, without impermissible mental or written reservation, to take the oath prescribed by the Nationality Act of 1940, sec. 335(b): "to support and defend the Constitution and laws of the United States against all enemies, foreign and domestic," and "to bear true faith and allegiance to the same," (8 U.S.C. sec. 735(b)), and

(2) He is not a person "attached to the principles of the Constitution of the United States" within the meaning of sec. 307(a) of the Nationality Act (8 U. S. C. sec. 707(a)).

Petitioner does not question the power of Congress to compel him to render military service. It is the position of the petitioner that a person willing to accept the determination of Congress as to the necessity and justification of war, and to do any and everything to further the prosecution of the war, in or out of the armed services, except actually taking a human life, can properly take the oath, "to

support and defend the Constitution and the laws of the United States against all enemies, foreign and domestic" and "to bear true faith and allegiance to the same" as required by sec. 335 of the Nationality Act, and does not, by reason of his unwillingness actually to bear arms fail to show that he is attached "to the principles of the Constitution of the United States" within the meaning of sec. 307 of the Nationality Act.

A. The Oath of Allegiance Prescribed in the Nationality Act of 1940, as Amended, Includes no Requirement Barring from Naturalization Those Who by Reason of Religious Scruples Alone Are Unwilling to Bear Arms in the Defense of the Country

Admittedly, the statutory oath does not in terms require an expression of willingness to bear arms in defense of the country. The authorization for demanding such a promise, if any there be, must be found by implication. In *United States* v. *Macintosh*, supra, Mr. Chief Justice Hughes referred to the oath required by the Constitution[4] and prescribed by R. S. sec. 1757 (5 U. S. C. sec. 16) containing the provision:

> "That I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion."

It it unquestioned that this form of oath has never been so construed as to preclude a person with conscientious religious scruples against bearing arms from honestly and legally swearing thereto. In view of the specific reference

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[4] Article VI, cl. 3: "The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious test shall ever be required as a Qualification to any Office or public Trust under the United States."

to foreign enemies, it may not reasonably be argued that this involves support and defense of the Constitution only insofar as it may be involved in the performance of the duties of the particular office.

Salmon P. Chase as Secretary of the Treasury and Edwin M. Stanton as Secretary of war both took this oath without suggestion being made that the oath prescribed by the Constitution could not be taken by a Quaker possessing conscientious scruples against the bearing of arms.

Clearly Congress did not intend by these words to require that all civil as well as military officers of the United States should, as a condition of taking office, promise to join the combatant forces in war time. Such a requirement would be manifestly irrelevant to the office. So here the naturalization oath "to support and defend the Constitution" does not necessarily imply a promise to participate with the combatant forces in war time.

If the promise to bear arms were to be held embraced in the civil oath, such a provision, contrary to the tenets of religious groups constituting an appreciable fraction of the citizens of this country, by so disqualifying them from holding office would, as Chief Justice Hughes said (283 U. S. 605, 63):

> "be generally regarded as contrary not only to the specific intent of the Congress, but as repugnant to the fundamental principle of representative Government."

In the light of the inhibitions against religious tests as a qualification of office (Art. VI, cl. 3), it is manifestly unreasonable to say that the language of the civil oath is to be interpreted as requiring a waiver of religious scruples: it is equally unreasonable to say that the same language in the naturalization oath is to be interpreted as making waiver of religious scruples of the essence. As Mr. Chief Justice Hughes concluded (p. 632):

> "But the naturalization oath is in substantially the same terms as the oath of office to which I have re-

> ferred. I find no ground for saying that these words are to be interpreted differently in the two cases. On the contrary, when the Congress reproduced the historic words of the oath of office in the naturalization oath, I should suppose that, according to familiar rules of interpretation, they should be deemed to carry the same significance."

The oath is "to support and defend the Constitution and laws of the United States." Military force is involved in "defending" the territory of a country against invasion, but a country's Constitution and laws are not necessarily in issue in its wars nor is it necessary that the country be at war for the Constitution and laws to need the support and defense of good citizens. In many ways good citizens support, defend, protect, cherish, shield, and vindicate the principles of the Constitution. These all express loyalty and intelligence; they have no military connotation.[5]

The long-established practice of accepting an equivalent for military service from those whose religious convictions forbid them to bear arms confirms the view that Congress, by prescribing the oath, did not intend to require a promise

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[4] It is not to be overlooked that the oath administered on induction into the United States Army states (10 U. S. C. 1581):

"I, , do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America; that I will serve them honestly and faithfully against all their enemies whomsoever; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to the Rules and Articles of War." (A. R. 615-500, ¶ 13 (September 1, 1942; AR. 615-500, ¶ 15F. (10 Aug. 1944) *In re Nielsen*, 60 F. Supp. 240-242, n. 2.

Many thousands who, because of religious scruples have been given non-combatant status, have nevertheless taken this oath without the suggestion ever having been made that because of their scruples against bearing arms they were not validly swearing "true faith and allegiance" to the United States.

[5] The first Naturalization Act of March 26, 1790, 1 Stat. 103, required merely proof of good character and the taking of the "oath or affirmation prescribed by law, to support the Constitution of the United States." The next, the Act of January 29, 1795, c. 20, 1 Stat. 414, required a showing that the applicant had behaved for five years as a man of good moral character "attached to the principles of the Constitution of the United States" and an oath, that, inter alia, "he will support the Constitution of the United States." All later acts required the same showing. See 3 Moore, International Law Digest, Section 381.

to give such service. It cannot reasonably be contended that the applicant alien is required in advance to guarantee his willingness to obey all laws that Congress may pass. Obviously, this could not be so with respect to statutes which encroach on the rights guaranteed by the first ten amendments.

The policy of granting exemption to those having religious scruples against the bearing of arms has been followed from Colonial times and is abundantly shown by the provisions of Colonial and State statutes,[7] of State constitutions,[8] and of Acts of Congress.

When the Federal Constitution was submitted to the several states for ratification, Rhode Island, North Carolina, Virginia and Pennsylvania proposed a further amendment which would specifically guarantee freedom of religion to those having religious scruples against bearing arms:

> "That any person religiously scrupulous of bearing arms is to be exempted upon payment of equivalent to

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[7] *Massachusetts:* Resolve June 16, 1781, c. 38, Laws and Resolves 1780-1781, p. 621; Acts January and November, 1776, Acts and Resolves (Province) v. 5, pp. 445, 595; Act 1758, Acts and Reserves, v. 4, p. 159. *New Hampshire:* Act June 1786, Laws (Metcalf ed.) v. 5, p. 177; Act March 1780, Laws, v. 4, p. 274. *New York:* Act February 1755, c. 972, Colonial Laws, v. 3, pp. 1068-1069. *North Carolina:* Act April 1778, 1st sess., c. 1 State Records, v. 24, p. 156; Act April, 1778, 3d sess., c. 1 State Records, v. 24, p. 193. *Virginia:* Act May, 1784, C. XXII, 11 Henn. 389; Act May, 1781, c. 8, 10 Hen. 417; Act October, 1780, c. 3, 10 Hen 334; Act May, 1780, c. XXXV, 10 Hen. 314; Act October, 1777, c. 1, 9 Hen. 345; Act May 1776, c. XII, 9 Hen 139; Act July, 1775, c. 1, 9 Hen. 34. During the colonial period and the period between the Revolutionary War and the adoption of the Constitution, the legislation of all the colonies and the thirteen original States allowed a citizen to obtain a substitute in place of his rendering personal service in the militia. At the present time, practically all of the States allow an exemption from service in the militia either on the absolute ground of conscientious scruples or on the same grounds permitted by the Federal Government.

[8] *Alabama*: 1867, Art. X, §1. *Arkansas*: 1868, Art. XI, §1. *Colorado*: 1876, Art. XVII, §5. *Idaho*: 1889, Art. XIV, §1. *Illinois*: 1870, Art. XII, §6. *Indiana*: 1851, Art. 12, §6. *Iowa*: 1857, Art. 6, §2. *Kansas*: 1859, Art. 8, §1. *Kentucky*: 1890, §220. *Louisiana*: 1898, Art. 300; *Maine*: 1819, Art. XI, §5. *Maryland*: 1864, Art. IX, §1. *Michigan*: 1908, Art. XV, §1. *Mississippi*: 1817, Art. IV, §3. *Missouri*: 1875, Art. 13, §1. *New Hampshire*: 1902, Part I, Art. 13th. *New York*: 1846, Art. XI, §1. *North Carolina*: 1868, Art. XII, §1. *North Dakota*: 1889, Art. XIII, §188. *Pennsylvania*: 1874, Art. 11, §1. *South Carolina*: 1895, Art. XIII, §1. *Tennessee*: 1870, Art. VIII, §3. *Vermont*: 1793, Chap. I, Art. 9. *Washington*: 1889, Art. X, §6. *Wyoming*: 1890, Art. XVII, §1.

pay another in his stead." (Elliot's Debates, Vol. I, pp. 334-335; Vol. II, pp. 531; Vol. III, pp. 657-659; Vol. IV, pp. 243-244.)

At the Pennsylvania Convention the Advocates of Religious freedom pointed out that "powers of Congress are too large. * * * In calling forth the militia on necessary occasions; because * * * they may coerce men to act in the militia whose conscience is against bearing arms in any case." (Elliott's Debates, Vol. II, p. 531.)

James Madison on June 8, 1789, presented to the House a list of amendments:

> "Fourthly. That in Article 1st, section 9, between clauses 3 and 4, be inserted these clauses, to wit:
>
> 'The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed. * * *
>
> 'The right of the people to keep and bear arms shall not be infringed; a well-armed and well-regulated militia being the best security of a free country: *but no person religiously scrupulous of bearing arms shall be compelled* to render military service in person.'" (Emphasis supplied.) Annals of Congress (Gales) 1st Congress, Vol. I, p. 434; see also Annals, Thirteenth Cong. Third sess. Vol. 28, pp. 774-775.))

The several forms of amendments proposed to protect religious liberty were ultimately merged, of course, in the First Amendment.

The statutes of the United States have, from the beginning, recognized the same policy of respecting the beliefs of those who entertain religious scruples against the Bearing of arms. The first Militia Act of May 8, 1792, sec. 2, c. 33, 1 Stat. 271, 272 provided:

> "All persons who now are or may hereafter be exempted by the laws of the respective states, shall be,

and are hereby exempted from militia duty, notwithstanding their being above the age of eighteen, and under the age of forty-five years."

Section 17 of the Draft Act of February 24, 1864, c. 13, 13 Stat. 6, 9, provided:

"That members of religious denominations, who shall by oath or affirmation declare that they are conscientiously opposed to the bearing of arms, and who are prohibited from doing so by the rules and articles of faith and practice of said religious denominations, shall, when drafted into the military service, be considered non-combatants, and shall be assigned by the Secretary of War to duty in the hospitals, or to the care of freedmen, or shall pay the sum of three hundred dollars to such person as the Secretary of War shall designate to receive it, to be applied to the benefit of the sick and wounded soldiers: Provided, That no person shall be entitled to the benefit of the provisions of this section unless his declaration of conscientious scruples against bearing arms shall be supported by satisfactory evidence that his deportment has been uniformly consistent with such declaration."

The Act of January 21, 1903, c. 196, sec. 2, 32 Stat. 775, provided:

"That nothing in this Act shall be construed to require or compel any member of any well-recognized organization at present organized and existing whose creed forbids its members to participate in war in any form and whose religious convictions are against war or participation therein, in accordance with the creed of said religious organization, to serve in the militia or any other armed or volunteer force under the jurisdiction and authority of the United States."

The Act of June 3, 1916, c. 134, sec. 59, 39 Stat. 166, 197, provided:

"All persons who because of religious belief shall claim exemption from military service, if the conscien-

tious holding of such belief by such person shall be established under such regulations as the President shall prescribe, shall be exempted from militia service in a combatant capacity; but no person so exempted shall be exempted from militia service in any capacity that the President shall declare to be non-combatant."

The Act of May 18, 1917, c. 15, sec. 4, 40 Stat. 76, 78, provided:

"* * * Nothing in this Act contained shall be construed to require or compel any person to serve in any of the forces herein provided for who is found to be a member of any well-recognized religious sect or organization at present organized and existing and whose existing creed or principles forbid its members to participate in war in any form and whose religious convictions are against war or participation therein in accordance with the creed or principles of said religious organizations, but no person so exempted shall be exempted from service in any capacity that the President shall declare to be non-combatant:"

The Selective Training and Service Act of 1940, September 16, 1940, c. 720, sec. 5(g), 54 Stat. 885, 889, provided:

"Nothing contained in this Act shall be construed to require any person to be subject to combatant training and service in the land or naval forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Any such person claiming such exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the land or naval forces under this Act, be assigned to non-combatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be assigned to work of national importance under civilian direction."

It is thus plain that the Congress, in exercising the war powers under the Constitution has also recognized that its exercise of this power must not limit the constitutionally protected individual liberties of the citizen to any greater extent than is reasonably necessary and proper to accomplish the important allowable ends of preserving the life of the Government and the States. *Dunne* v. *United States*, 138 F. 2d 137, 141 (C.C.A. 8, 1943) cert. denied 320 U. S. 790.

Read in the light of the uniform regard by Congress for freedom of religious conscience, the oath of allegiance cannot by mere implication reasonably be read as requiring an expression of willingness actually to bear arms.

Petitioner recognizes the propriety of questions addressed to determining his fitness for citizenship. And the question (R. 6): "If necessary, are you willing to take up arms in defense of this country?" may possibly be appropriate in some cases to evoke answers indicative of such fitness. But when it appears that such question is answered in the negative solely on religious grounds, and when it further appears that aside from actual combatant service involving the shedding of blood, the applicant is ready and willing to render full military service, then it seems clear that the negative answer cannot be made the basis for assertion that the applicant cannot in good faith take the oath.

B. The Statutory Requirement That the Applicant Establish That He is "Attached to the Principles of the Constitution" Does Not Justify Exaction of a Promise to Bear Arms

The phrase "principles of the Constitution" is obviously rather loose. Since it appears in an enactment of Congress, it is important to determine not merely what those principles are but particularly what principles were contemplated by Congress as within the meaning of the language used. More particularly, it is essential to determine whether the Congress in using this language intended to include as

a "principle" the doctrine that, despite the provisions of the First Amendment, those religiously scrupulous of the actual taking of human life but willing to serve in the military arm in a non-combatant capacity are, nevertheless, under the war power and without regard to actual exigency subject to being required actually to bear arms.

The requirement of proof of attachment to the principles of the Constitution of the United States was originally introduced into our laws by the Act of January 29, 1795, 1 Stat. 414. It was intended to insure that the alien was "attached to a republican form of Government", and "a free representative Government deriving its authority from the people and calculated for their benefit" (Annals of Congress (Gales ed.) Third Cong., Vol. 4, pp. 4021, 4022). The phrase has been held to mean "attachment to the principles of free Government which are embedded in that instrument" and to imply "a depth of conviction which would lead to active support of the principles in question, to doing one's share to maintain them". *In re Shanin*, 278 Fed. 739, 741; *In re Levy*, 278 Fed. 621, 623; *In re Stone*, 284 Fed. 868, 871; *In re Bevilacqua*, 295 Fed. 862; *In re Saralieff*, 59 F. 2d 436 (E. D. Mo. 1932); *In re Van Lacken*, 22 F. Supp. 145, 147 (N.D. Calif. 1938). And the Government has taken the position that the alien must believe in and sincerely adhere to the "general political philosophy" of the Constitution. Gov't Br. in *Schneiderman* v. *United States*, No. 2., O.T. 1942. But the Fifth Amendment and the many changes since made in the Constitution refute the idea that attachment to any particular provision is essential to satisfy the naturalization requirements. *Schneiderman* v. *United States*, 320 U.S. 118, 137-38; *United States* v. *Rorin*, 12 F. 2d 942, 944-945.

By the very generality of the term employed it is evident that Congress intended an elastic test, one which should not be circumscribed by attempts at precise definition. *Schneiderman* v. *United States*, 320 U.S. 118, 139. The

difficulty or impossibility of precise definition of the boundaries of the war power insofar as it affects the Bill of Rights is well recognized. The validity of any particular measure drafting men to actually bear arms will depend on all the conditions which obtain at the time the measure is imposed and which support the law imposing it. Cf. *Hirabayashi* v. *United States*, 320 U.S. 81, 99, 101-102. The liberties insured by the First Amendment have a preferred position in the basic scheme (*Schneider* v. *Irvington*, 308 U.S. 147, 161; *Cantwell* v. *Connecticut*, 310 U.S. 296; *Prince* v. *Massachusetts*, 321 U.S. 158, 164) and the freedom of worship guaranteed by the First Amendment is susceptible of restriction only to prevent grave and immediate danger to interests which the Government may lawfully protect. *Board of Education* v. *Barnette*, 319 U.S. 624, 639. To make accommodation between this freedom and the Government's granted powers is therefore always delicate. *Prince* v. *Massachusetts*, 321 U.S. 158, 165. "Congressional enactments having the purposes of raising or maintaining armed forces have high standing because of their importance. At the same time, they must not limit the constitutionally protected individual liberties of the citizen to any greater extent than is reasonably necessary and proper to accomplish the important allowable ends of preserving the life of the Government and the State and their orderly conduct." *Dunne* v. *United States*, 138 F. 2d 137, 141 (C.C.A. 8, 1943), cert. den. 320 U.S. 790. Here involved is a constitution "intended to endure for ages to come, and, consequently to be adapted to the various *crises* of human affairs." *McCulloch* v. *Maryland*, 4 Wheat. 316, 407, 415; *Hirabayashi* v. *United States*, 320 U.S. 81, 100-101. Because of these basic premises, this Court will not presume in construing the naturalization law that Congress meant to circumscribe liberty of religion by general phrases in that statute. Such general phrases "should be construed, not in opposition to, but in accord with, the theory and practice of our Government in relation to freedom of conscience".

United States v. *Macintosh* (dis.), 283 U.S. 605, 635; *Schneiderman* v. *United States*, 320 U.S. 118, 132, 135. And here the theory and practice of the Congress from the beginning has been, as shown above, to exempt from combatant duties those having religious scruples against bearing arms.

History shows, and within the memory of all, in World Wars I and II it has been established that there are other, and important, methods of aiding defense apart from the duties of actual combatant service involving directly the taking of life. The experiences of modern warfare particularly establish that service as a combatant soldier does not necessarily involve greater risks and is no more indispensable in the war effort than is service in numerous other capacities, both in and out of the military service. Modern "total" warfare has merely accentuated this basic fact.

Subject to this exception as to combatant service established by theory and practice the petitioner, as do all other members of the Seventh Day Adventist denomination, adheres to and recognizes the full authority of Congress to subject him to military jurisdiction, and his correlative duties as a non-combatant to serve in the military arm (*Billings* v. *Truesdell*, 321 U.S. 542, 556) and to "take his place in the ranks of the army of his country and risk the chance of being shot down in its defense"; *Jacobson* v. *Massachusetts*, 197 U.S. 11, 29; *United States* v. *Macintosh*, 283 U.S. 605, 624; *In re Kinloch*, 53 F. Supp. 521, 522-523.

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*The non-combatant position of the Seventh Day Adventist Denomination has often been grossly misunderstood. This position is not antimilitarism, it is not pacifism, it is not conscientious objection to war as an instrument of governmental policy as that is ordinarily understood. Seventh Day Adventists do not condemn those who take part in war. On the contrary, as non-combatants they recognize, and have been outstanding in performance of, their duty to aid their government in every way in time of warfare, except by taking human life. They have donned the uniform of the soldier and except for actual bearing of arms have performed all the duties of soldiers. Even under fire, they have helped fortify positions; so also have they been foremost, often under fire, in rendering medical aid to the wounded and sick; and have been constant in all measure to protect human life. They have buried the dead, trans-

By his qualification of the oath the applicant has demonstrated no opposition to the form of the Government or to the principles of free government or the general political philosophy embodied in the Constitution and he has complied with all requirements expressly imposed by the Nationality Act. That Congress who prescribes the terms and conditions of naturalization has made no express requirement of expression of willingness to bear arms is apparent from an examination of the various sections of the Nationality Act. In view of the enactment of the various statutes exempting those having religious convictions against bearing arms from compulsory combatant service, the omission of such an express requirement from the Nationality Act is highly significant." It seems plain that the required showing that the applicant is "attached to the principles of the United States", was not intended by the Congress to include exaction of a promise to bear arms in derogation of the religious belief of the applicant.

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ported men and supplies; and in aid of the war effort, have labored in the factories, the munitions plants, the mines, and the fields wherever the defense of the nation could best be served. The non-combatant is not a coward; he simply conscientiously and courageously objects to affirmative participation in the taking of human life; he dares, however, to assume any military risk necessary to save life.

A Seventh Day Adventist non-combatant does not agitate against war. He recognizes that war is many times unavoidable in the preservation of the State. He does not arrogate to himself the prerogative of deciding whether the government is right or wrong in entering upon a war. He merely maintains an attitude and a conviction that war, whether right or wrong, whether justified or unjustified, whether of aggression or of defense, does not change his obligation of obedience to God.

See official statement of Seventh Day Adventist non-combatant position in "Information and Instructions for Seventh Day Adventist Non-combatant Selective Service Registrants" prepared by Carlyle B. Haynes, General Secretary, of the Seventh-day Adventist War Service Commission, General Conference of Seventh Day Adventists, July; 1944, Appendix, Infra, p. —.

" The refusal to take an oath in advance to bear arms of course creates no rights in the applicant, contractual or otherwise, exempting him from combatant military service, if Congress should so require, and by refusing to take such an oath he does not seek a preferred status. He recognizes the principle of submission to majority rule insofar as it does not trench upon the amendments protecting minorities and he recognizes the fact that the government has the power to regulate and restrain the conduct of the individual citizens under threat of imprisonment or other penalty.

C. Amendatory Legislation in 1942 Makes Plain the Intention of Congress That Statement of Willingness to Bear Arms is Not Required as a Condition of Naturalization Under the Nationality Act of 1940

The Congress by amendment in 1942 of the Nationality Act of 1940 has confirmed that the statute requiring the oath and the showing of attachment to the principles of the Constitution does not by implication bar an alien applicant willing to serve in the military forces but retaining religious scruples against taking human life or bearing arms. By those amendments Congress twice in 1942 expressly recognized the eligibility for citizenship under the general law of one thus unwilling to bear arms. The Second War Powers Act, March 27, 1942, c. 199, sec. 1001, 56 Stat. 176, 182-183, amended the Nationality Act of 1940 to add a new Title III. Section 701 in Title III so added, and as further amended by the Act of December 22, 1944, c. 662, sec. 1, 58 Stat. 886, provides:

> "* * * any person not a citizen, regardless of age, who has served or hereafter serves honorably in the military or naval forces of the United States during the present war * * * may be naturalized upon compliance with all the requirements of the naturalization laws except that" the declaration of intention, period of residence, venue, command of the English language, handwriting or signature, and fees are not to be required (8 U.S.C. Supp. IV, sec. 1001; see App'x, p. 37).

Significantly, Section 704, part of the new Title III and added at the same time by the same section of the Second

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In declaring allegiance to the Government of the United States he is willingly submitting himself to the same subjection to the powers of the government as the native born citizen is under. He is not attempting to "conclude the Government" or "stay its hand." He only wishes to be placed on a par with the natural born citizen and not come in on an unequal footing.

War Powers Act, provides (8 U.S.C. Supp. IV sec. 1004; see App'x, p. 37):

> "The provisions of this title shall not apply to * * * (2) any conscientious objector who performed no military duty whatever or refused to wear the uniform * * *."

These amendments to the Nationality Act were accompanied by no amendment of Section 307 or of Section 335 of the Nationality Act of 1940, here under scrutiny and requiring attachment to the principles of the Constitution and prescribing the oath, respectively.

The necessary inference is that Congress intends and recognizes that one who did serve in the military or naval forces and did perform military duty, does not, by reason of his scruples against bearing arms, fail to comply with all the requirements of the naturalization law, i.e. that the oath of allegiance (Section 335) may be taken and the statutory showing of attachment to the principles of the Constitution (Section 307) may be satisfied despite refusal of applicants to state a willingness to bear arms. To hold the contrary would be to nullify the amendment. *In re Kinloch*, 53 F. Supp. 521, 523 (W.D. Wash. 1944); *In re Sawyer*, 59 F. Supp. 428 (Del. 1945). In these cases the courts expressly overruled the contention of the United States that the applicants could not take the oath of allegiance because of their continuing religious convictions against bearing arms. As the court pointed out in the *Kinloch* case (p. 523):

> "If conscientious objectors, who are aliens, performing military duty, and wearing the uniform, are not granted the privileges of citizenship under this act, then the act would be meaningless. It would be so made if an applicant, being a conscientious objector, who has attained the status of a soldier, performs military duty, and honorably wears the uniform (as is admitted in the instant case), is denied citizenship. If the oath of allegiance is to be construed as requiring such

applicant to agree, without mental reservation, to bear arms, then the result would be a denial of citizenship, 'even though Congress has conferred such privilege upon him.'"[1]

The interpretation by Congress of the statutory oath as not requiring willingness to bear arms is thus clear. And this same congressional purpose and interpretation was re-emphasized by the similar Act of December 7, 1942, c. 690, 56 Stat. 1041, adding Section 323a to the Nationality Act (8 U.S.C. Supp. IV sec. 723a; App'x pp. . . .). It too dispenses with certain of the ordinary prerequisites for naturalization as to a person who was a member of the military or naval forces during the Spanish-American War, the 1916-1917 Mexican Border troubles, or during World War I—

> "who is not an alien ineligible to citizenship, * * * who was not a conscientious objector who performed no military duty whatever or refused to wear the uniform * * * Such petitioner shall verify his petition for naturalization by the affidavits of at least two credible witnesses who are citizens of the United States, or shall furnish the depositions of two such witnesses * * * to prove the required * * * *attachment to the principles of the Constitution of the United States* * *. (Emphasis supplied.)

The obvious conclusion is that Congress thereby again recognized that despite his refusal to bear arms a conscientious objector satisfying the other conditions of the statute may properly take the oath of allegiance and be deemed to satisfy the requirements as to attachment to the principles of the Constitution.

True, petitioner cannot take advantage of the special provisions of these two amendments since he has never served in the armed forces. But he does not invoke those sections directly.

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[1] The propriety of this interpretation was conceded by the Department of Justice but rejected in *In re Nielsen*, 60 F. Supp. 240, 242 (D. C. 1945).

The important feature of the 1942 legislation is that Congress, without abrogation or modification of the statutory requirements as to oath and attachment to the principles of the Constitution has expressly recognized that such requirements may be fulfilled by an otherwise qualified alien applicant despite his religious conviction against bearing arms.

The majority opinion of the court below holds that a special dispensation as to the oath was by the 1942 amendment extended to the defined class despite the fact that such dispensation was not included among those specifically granted. It held (R. 26):

> "Congress, we think, in passing this amendment, intended to reward the conscientious objectors who had served or were serving in the armed forces by allowing them to take an oath which did not conflict with their religious scruples. It has passed no legislation expressly changing the meaning as interpreted by the Supreme Court, we do not believe that it intended to extend this reward beyond this particular group."

The attempted reconcilement is invalid. As stated by Judge Woodbury in his dissent (R. 29):

> "The interpretation placed upon this amendment by my associates seems to me to accord to Congress an intention to have the words of the oath mean one thing to a person who is willing to serve and has served in the military forces to the extent permitted by his scruples, and something else to one equally willing to serve but who for reasons of age, sex, dependency or physical unfitness has not been called upon or permitted to do so. I think Congress must have intended the words of the oath to mean the same thing to one who has served in the military or naval forces as they do to one who has not."

Furthermore, the holding of the majority below overlooks that its decision also gives two different meanings to the phrase "attached to the principles of the Constitution" as

those words are used in the Nationality Act: According to the court below, in section 323(a) and 701 of the same Act (8 U.S.C. sec. 723a, 1001) it permits of unwillingness of the applicant to bear arms because of religious scruples, but in section 307(a) (8 U.S.C. sec. 707(a)), the phrase requires willingness to bear arms despite religious scruples. Common sense would dictate a contrary rule. Under decisions of this Court a statute, after amendment, is to be understood in the same sense exactly as if it had read from the beginning as it does amended. *Blair* v. *Chicago*, 201 U.S. 400, 475; *United States* v. *La Franca*, 282 U.S. 568, 578 and cases cited. In the absence of express restriction or other cogent reason, it is properly to be assumed that a term is used throughout a statute in the same sense. *United States* v. *Cooper Corp.* 312 U.S. 600, 607; *Pampanga Mills* v. *Trinidad*, 279 U.S. 214, 216-217. On principle, "support and defend the Constitution of the United States" in the same oath of allegiance cannot mean one thing when sworn by one applicant and something else when sworn by another. And the attachment to the principles of the Constitution required by section 307(a) of the Act (8 U.S.C. sec. 707(a)) must mean the same thing in Sections 323(a) and 701 (8 U.S.C. secs. 723a, 1001) for each requires of the specified class "compliance with all the requirements of the naturalization laws" save for the specified exceptions none of which refer to the oath or attachment to the principles of the Constitution. Indeed, a provision in section 323(a) (8 U.S.C. sec. 723a) reaffirms that the applicant must by witnesses "prove the required * * * attachment to the principles of the Constitution." The "required * * * attachment" can refer only to the attachment required by section 307(a), the section here involved.

Congress by the 1942 amendments has made it clear that the sections of the Nationality Act here in question and their practically identical forerunners upon which the decisions in the *Schwimmer* and *Macintosh* cases were posited are not to be regarded as impliedly requiring as a condition

of naturalization declaration by the applicant of willingness to bear arms.

II.

Prior Decisions of This Court to the Extent That They Are Not Clearly Distinguishable Should Be Reconsidered and Overruled.

As the Government in its Memorandum on petition for the writ concedes, the *Schwimmer* and *Macintosh* decisions relied on by the court below (R. 23-25) are distinguishable on their facts. In those cases the statutory oath of allegiance required as a condition to naturalization was held to bar the applicants because statements in the preliminary forms for petition for naturalization and on hearing were deemed to indicate lack of ability, without unpermissible mental or written reservation, to take the required oath "to support and defend the Constitution and laws of the United States against all enemies, foreign and domestic" and as well were deemed inadequate to satisfy that the applicant was "attached to the principles of the Constitution." Those cases, however, were decided on facts quite different from those presented in the instant case and involved applicants whose asserted rights of conscience if recognized would have imposed serious limitation on the war power of Congress and in effect and tendency constituted much greater threats to the untrammeled exercise of that power.

Here it merely appears that petitioner, because of his religious scruples against the taking of human life, is unwilling to bear arms in the technical sense of the word. So far as appears, he recognizes that under the war power, once Congress has spoken, its decision in making war is final and must, of necessity, be binding on all. He is willing to serve in the armed forces of the United States and under the military jurisdiction as this court has recently reaffirmed the right of Congress to require. *In re Summers*, 325 U.S.

561, 572-573. Petitioner asserts no right to question the moral rightness of any particular war, nor does he debate the finality and necessarily binding effect on him of the decision of Congress. Neither does he seek to reserve to himself determination of the extent or manner in which he shall assist in the defense of the country; his willingness to support the Government in time of war is unequivocal. His sole limitation is that as a matter of religious belief he cannot take human life and in that sense cannot bear arms. As has been abundantly exemplified in the present war, the attitude of such persons in no way tends to influence others against the use of military force. On the contrary the history of this war has again established that in the medical corps, in the hospital corps, and in other branches of the military forces they have by their fearless conduct and indifference to danger in succor of others inspired and fortified all in the stress of battle.[12]

The facts and reasoning in the cases cited by the court below (R. 23-24) make it plain that they have erroneously been held controlling in the instant case.

In *United States* v. *Schwimmer*, 279 U.S. 644, it appears that the applicant's refusal to express a willingness to bear arms and this Court's holding that she failed to show the required attachment and ability to take the prescribed oath were based on the following reasons:

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[12] Of the nearly twelve thousand members of the Seventh-day Adventist denomination who served as non-combatants in the military and naval forces of the United States during hostilities just ended, we are informed that forty-five received the bronze Star Medal, six of which also received Oak Leaf Clusters with these medals; twelve received the Silver Star Medal, two of which also received Oak Leaf Clusters with these medals; one received the Gold Star Medal; six received special Commendations; one received the Air Medal; Sixteen received Presidential Citations; three received Meritorious Service Plaques; three received Legion of Merit Awards; one received a Certificate of Merit; five received the Soldier's Medal; one received the Cruix de Guerre; and one received the Congressional Medal of Honor.

Ninety-two men have received a total of one hundred nine awards. Although the check has not yet been completed, a large proportion of these awards has been vertified by the War and Navy Departments.

(1) She was an avowed pacifist. This Court held (p. 652):

> "But the word is also used and understood to mean one who refuses or is unwilling for any reason to bear arms because of conscientious considerations and *who is disposed to encourage others in such refusal.*" (Emphasis supplied)

(2) She had "no sense of nationalism, only a cosmic consciousness of belonging to the human family" (p. 648). This court held (pp. 651-652) that this and her pacifism

> "—justifies belief that she may be opposed to the use of military force as contemplated by our Constitution and laws."

(3) She stated: "With reference to spreading propaganda among women throughout the country about my being an uncompromising pacifist and not willing to fight, I am always ready to tell anyone who wants to hear it that I am an uncompromising pacifist and will not fight. In my writings and in my lectures I take up the question of war and pacifism if I am asked for that" (p. 648-649). This court held (pp. 651-652):

> "The influence of conscientious objectors against the use of military force in defense of the principles of our Government is apt to be more detrimental than their mere refusal to bear arms. * * * And her testimony clearly suggests that she is disposed to exert her power to influence others to such opposition.

(4) No question of religious belief was involved. The Solicitor General in his brief in that case said (p. 17): "Refusal to perform military service on account of religious scruples is not involved in this case."

In contrast, the applicant here, like his co-religionists, has emphasized a willingness to serve in the military forces so long as he is not compelled as a combatant to take human life and there is no showing of purpose or disposition on

his part to influence others. His scruples are solely religious. The *Schwimmer* case thus falls far short of requiring denial of the application of the petitioner here involved.

In *United States* v. *Macintosh*, 283 U.S. 605, the applicant had no religious scruples against the taking of human life or against bearing arms in defense of the country and he expressly stated that he was willing to bear arms (p. 617). There the disqualification rested upon the entirely distinct ground, not at all present here, that the applicant sought to reserve to himself the right to determine the moral justice of any war despite the decision of Congress. There the evidence as to the applicant showed, as this Court said (p. 619-620):

> "that he will not assist in the defense of the country by force of arms or give any war his moral support unless he believes it to be morally justified, however necessary the war might seem to the government of the day; that he will hold himself free to judge of the morality and necessity of the war, and, while he does not anticipate engaging in propagandizing against the prosecution of a war declared and considered justified by the government, he prefers to make no promise even as to that; and that he is convinced that the individual citizen should have the right to withhold his military services when his best moral judgment impels him to do so."

This Court held (p. 625) that the applicant—

> "discloses a present and fixed purpose to refuse to give his moral or armed support to any future war in which the country may be actually engaged, if, in his opinion, the war is not morally justified, the opinion of the Nation as expressed by Congress to the contrary notwithstanding."

As pointed out by Dean Wigmore, Macintosh would on principle be unsubmissive to all laws directed to winning the war. "The Macintosh principle is nothing less than the right of individual secession." Wigmore, United States v. Macintosh, A Symposium, 26 Ill. L. Rev. 375, 377, 379. Fur-

thermore, the right of the individual to judge for himself as to the moral justification for a particular war, once recognized, would presumably involve the right to be adequately informed of the relevant facts in order to make an informed judgment. But reference to the recognized criteria for determining whether a war is just (3 Vattel, Law of Nations (Text of 1758, Translation) Book III, c. 3, secs. 28, 37, 38, 41-44, pp. 244, 246-249) makes it apparent that the war might be fought and lost or won long before all relevant circumstances were known to anyone, much less the average citizen. As was pointed out by the Solicitor General in his brief in that case, p. 11: "If [the right of the individual to decide for himself whether a war is morally justified were recognized] the constitutional powers of Congress to declare war and raise and support armies would become impotent."

Obviously, there is nothing in the record that brings the petitioner within the *Macintosh* case. Petitioner has indicated not the slightest hesitation to accept the expressed will of the Government nor a lack of willingness at all times to support and defend the Government and in every way to further, and in no way hinder, by propaganda or otherwise, the successful prosecution of war, whether he be within or without the armed forces of the nation, save that he will not actually bear arms as a combatant since that would necessarily involve obligation to take human life.

Thus the *Schwimmer* and *Macintosh* cases afford no basis for denial of naturalization to petitioner. They do not hold that a mere religious scruple against bearing arms by an applicant otherwise recognizing and willing to discharge his military obligation is to be regarded as presenting an insurmountable barrier. One who, subject to his religious inhibition against taking human life, recognizes the plenary authority of Congress under the war power and reserves no right to hinder or impair any exercise of that power but is ready to risk his life in the military forces and in

other ways to uphold the hands of the authorities surely is not to be classed with those who would subvert the defense of the Government upon their own judgment that a war is morally justified.[13]

In the majority opinion in *United States* v. *Bland*, 283 U.S. 636, it is stated (p. 636): "The only difference between the position she took, and that taken by the respondent in the *Macintosh* case, is that in addition to refusing positively to bear arms in defense of the United States under any circumstances, she required an actual amendment of the oath * * *." Examination of the record in that case does disclose, as the Government contends, that the applicant's reservation related to her religious scruples alone and that these limited her willingness to do everything within her power in defense of the country only to the same extent as do those of the applicant in the instant case. She avowed her continued willingness, already demonstrated, to serve as a nurse or in any other capacity subject to the military jurisdiction, so long as it did not involve the taking of life.[14] Subsequent legislation has on a number of bea-

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[13] It has been suggested that the dissenting opinion in the *Macintosh* case was not addressed to showing that Macintosh was entitled to admission but rather was an argument that the matter should be considered from the point of view of a person who in the future might apply for citizenship and who, as a member of a well-recognized religious sect opposed to war in any form would, because he thus falls within the express language of the Act of May 18, 1917, c. 15, sec. 4, 50 Stat. 76, 78, be able to take the position that he, though an alien, is in the same class as many citizens of the United States who have for a long time been exempt from combatant service. Cf. Wigmore and Sears, United States v. Macintosh, A Symposium, 26 Ill. L. Rev. 375, 380, 383.

The precise boundary of the liberty of religious conscience recognized by the naturalization law need not be decided in this case, since clearly petitioner satisfies the minimum showing recognized by the Congress as entitling to exemption from combatant service in both the Draft Act of 1917, supra p. ..., and the Selective Training and Service Act of 1940 supra p. ...

Neither is there here presented any question that petitioner's objections to bearing arms are prompted by conscience or that his scruples are religious in character. Cf. *Kauten* v. *United States*, 133 F. 2nd 703 (C. C. A. 2, 1943); see Cornell, The Conscientious Objector and the Law (1943) p. 16.

[14] Indeed under the Act of December 7, 1942, c. 690, 76 Stat. 1041, Miss Bland would now appear to be eligible for citizenship despite her religious scruples, and as well free of certain requirements as to residence, etc., see supra, p. ...

sions been recognized as requiring this Court to re-examine and overrule its prior decision. *Helvering* v. *Griffiths*, 318 U.S. 371, 401. For the reasons outlined above, and particularly because of the 1942 amendments to the Nationality Act of 1940, it is submitted that the decision in the *Bland* case should now be re-examined and overruled.

Conclusion

It is submitted that the judgment of the Circuit Court of Appeals for the First Circuit should be reversed.

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APPENDIX

The Nationality Act of 1940, October 14, 1940, c. 876, 54 Stat. 1137, 1142, 1157, provides:

Sec. 307. (a) No person, except as hereinafter provided in this Act, shall be naturalized unless such petitioner, (1) immediately preceding the date of filing petition for naturalization has resided continuously within the United States for at least five years and within the State in which the petitioner resided at the time of filing the petition for at least six months, (2) has resided continuously within the United States from the date of the petition up to the time of admission to citizenship, and (3) during all the periods referred to in this subsection has been and still is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States [8 U. S. C. sec. 707(a)].

Sec. 335. (a) A person who has petitioned for naturalization shall, before being admitted to citizenship, take an oath in open court (1) to support the Constitution of the United States, (2) to renounce and abjure absolutely and entirely all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which the petitioner was before a subject or citizen, (3) to support and defend the Constitution and the laws of the United States against all enemies, foreign and domestic, and (4) to bear true faith and allegiance to the same, provided that in the case of naturalization of a child under the provisions of section 715 or 716 the naturalization court may waive the taking of such oath if in the opinion of the court the child is too young to understand its meaning. [8 U. S. C. sec. 735 (a)].

(b) The oath prescribed by subsection (a) of this section which the petitioner for naturalization is required to take, shall be in the following form:

I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity

to any foreign prince, potentate, state, or sovereignty of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I take this obligation freely without any mental reservation or purpose of evasion: So help me God. In acknowledgment whereof I have hereunto affixed my signature [8 U. S. C. Sec. 735 (b)].

The Second War Powers Act, March 27, 1942, c. 199, sec. 1001, 56 Stat. 176, 182-183, amended the Nationality Act of 1940 by adding a new Title III including the following sections here pertinent:

Sec. 701. Notwithstanding the provisions of sections 303 and 326 of this Act, any person not a citizen, regardless of age, who has served or hereafter serves honorably in the military or naval forces of the United States during the present war and who, having been lawfully admitted to the United States, including its territories and possessions, shall have been at the time of his enlistment or induction a resident thereof, may be naturalized upon compliance with all the requirements of the naturalization laws except that (1) no declaration of intention and no period of residence within the United States or any State shall be required; (2) the petition for naturalization may be filed in any court having naturalization jurisdiction regardless of the residence of the petitioner; (3) the petitioner shall not be required to speak the English language, sign his petition in his own handwriting, or meet any educational test; and (4) no fee shall be charged or collected for making, filing, or docketing the petition for naturalization, or for the final hearing thereon, or for the certification of naturalization, if issued: *Provided, however,* That (1) there shall be included in the petition the affidavits of at least two credible witnesses, citizens of the United States, stating that each such witness personally knows the petitioner to be a person

of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States, (2) the service of the petitioner in the military or naval forces of the United States shall be proved by affidavits, forming part of the petition of at least two citizens of the United States, members or former members during the present war of the military or naval forces of the non-commissioned or warrant officer grade or higher (who may be the witnesses described in clause (1) of this proviso), or by a duly authenticated copy of the record of the executive department having custody of the record of petitioner's service, showing that the petitioner is or was during the present war a member serving honorably in such armed forces, and (3) the petition shall be filed not later than one year after the termination of the effective period specified in section 645 of the Appendix to Title 50. The petitioner may be naturalized immediately if prior to the filing of the petition the petitioner and the witnesses required by the foregoing proviso shall have appeared before and been examined by a representative of the Immigration and Naturalization Service [8 U. S. C. Supp. IV, sec. 1001].

Sec. 704. The provisions of this title shall not apply to (1) any person who during the present war is dishonorably discharged from the military or naval forces or is discharged therefrom on account of his alienage, or (2) any conscientious objector who performed no military duty whatever or refused to wear the uniform: *Provided*, That citizenship granted pursuant to this subchapter may be revoked as to any person subsequently dishonorably discharged from the military or naval forces in accordance with Section 738 of this title; and such ground for revocation shall — in addition to any other provided by law [8 U. S. C. Supp IV sec. 1004].

The Act of December 7, 1942, c. 690, 56 Stat. 1041 amended the Nationality Act of 1940 by adding:

> Sec. 323 (a). A person who was a member of the military or naval forces of the United States at any time after April 5, 1917, and before November 12, 1918, or at any time after April 20, 1898, and before July 5, 1902, or who served on the Mexican Border as a member of the regular Army or National Guard from June 1916, to April 1917, who is not an alien ineligible to citizenship, who was not at any time during such period or thereafter separated from such forces under other than honorable conditions, *who was not a conscientious objector who performed no military duty whatever or refused to wear the uniform,* and who was not at any time during such period or thereafter discharged from the military or naval forces on account of his alienage, shall, if he has resided in the United States continuously for at least two years pursuant to a legal admission for permanent residence in lieu of the usual five years' residence within the United States and six months' residence within the State of his residence at the time of filing the petition for naturalization, during all of which two-year period he has behaved as a person of good moral character, be entitled at any time within one year after the date of approval of this Act to naturalization upon compliance with all of the requirements of the naturalization laws, except that—
>
> (1) no declaration of intention shall be required;
>
> (2) no certificate of arrival shall be required unless such person's admission to the United States was subsequent to March 3, 1924; and
>
> (3) no residence within the jurisdiction of the court shall be required.
>
> Such petitioner shall verify his petition for naturalization by the affidavits of at least two credible witnesses who are citizens of the United States, or shall furnish the depositions of two such witnesses made in accordance with the requirements of subsection (e) of

section 327 of the Nationality Act of 1940, to prove the required residence, good moral character, attachment to the principles of the Constitution of the United States, and favorable disposition toward the good order and happiness of the United States. On applications filed for any benefits under this Act, the requirement of fees for naturalization documents is hereby waived [8 U. S. C. Supp. IV, sec. 723a].

The Seventh-Day Adventist Belief With Respect to Bearing Arms

"Information and Instruction for Seventh-day Adventist Noncombatant Selective Service Registrants" prepared by Carlyle B. Haynes, General Secretary of the Seventh-day Adventist War Service Commission and Member of the Executive Committee of the General Conference of Seventh-day Adventists, includes the following statement as to the religious belief of that denomination with respect to the bearing of arms:

The Noncombatant Position

Seventh-day Adventist men, because of their religious training and belief, are rightly classified under the Selective Training and Service Act as "Conscientious Objectors." There is an element in this fact which is unfortunate, for they do not consider this an accurate description of their real position.

"Conscientious objection to war" may be an accurate description of the position of pacifists, war-resisters, anti-militarists, and others who refuse to serve in the armed forces of the United States. It does not, however, adequately describe the position of noncombatancy held by Seventh-day Adventists.

From the beginning of their organized existence, Seventh-day Adventists have called themselves noncombatants. They still call themselves noncombatants. They still hold the noncombatant position.

This is not anti-militarism, it is not pacifism, it is not conscientious objection to war as that is ordinarily understood. It is rather a discriminating recognition of the divinely stated principle enunciated by Jesus Christ that the Christian lives and moves in a twofold area of obligation and loyalty. He has a duty to his government as well as to his God. He is to render to Caesar those things that belong to him just as faithfully as he renders to God those things which belong to God.

Seventh-day Adventists, therefore, holding this belief of noncombatancy, are not thereby moved to oppose their government in war any more than they oppose it in peace. Rather are they instructed to obey their government in war as in peace, within the full limits in which a Christian can rightly live and act.

They do not assume one attitude toward government in time of peace, and take an opposite attitude in time of war. Rather do they hold that a Christian's attitude and allegiance to both God and government are not altered by either war or peace.

The belief of the Seventh-day Adventist noncombatant does not require him to agitate against war, to oppose militarism, to be insubordinate, to oppose the military program, or to stand apart from the military establishment and organization. It merely requires that a Seventh-day Adventist shall continue to be a Christian in war as well as in peace, recognizing that his allegiance to God, which is his first and highest allegiance, is supreme then as it has been supreme before.

The essential meaning of his belief as a noncombatant, to a Seventh-day Adventist, is merely that he recognizes there are no circumstances in earthly affairs which can arise, no emergencies which can occur, no distress of nations which can come, which can possibly alter in a single degree his obligation, his obedience, his allegiance, his loyalty, his duty, to his Maker and Redeemer.

Noncombatancy's simplest but most comprehensive definition is just "God first—always."

The noncombatant belief grows out of a philosophy of relationship, not primarily with reference to government, but to God. It is not a political philosophy at all.

A Seventh-day Adventist noncombatant does not agitate against war. He recognizes that war is a natural, unavoidable consequence of a race in a state of sin. He does not arrogate to himself the prerogative of deciding whether his government is right or wrong in entering upon a war. He leaves that where it belongs, —to his government.

He recognizes that war is an agency which God Himself has on occasion used to carry out divine objectives. He does not presume to sit in judgment upon civil governments for engaging in war. He merely maintains an attitude and a conviction that war, whether right or wrong, whether justified or unjustified, whether of aggression or of defense, does not change the individual Christian's obligation of obedience to God.

His belief in his denominational teaching of noncombatancy does not move the Seventh-day Adventist to refuse to wear a uniform, to salute his country's flag, to obey military orders. He will participate in any service, in the military service or out of it, in war or in peace, which will contribute to the saving, the maintenance, the well-being, of human life. He holds that his supreme allegiance to God, his discipleship to Jesus Christ, prevents him from engaging in any act, any service, any participation in anything which contributes to destroying or injuring human life, in the military service or out of it, in war or in peace.

Noncombatancy does not concern itself with what the government does or does not do. It concerns itself only with the individual's accountability to God. Always, everywhere, in every condition or circumstance, the individual Seventh-day Adventist noncombatant just puts God's will first.

He will participate in the military establishment. He will enter willingly upon training and service. He will wear his country's uniform. He will salute his

country's flag. He will aid his country in its need. He will be diligent in the performance of his duties. He will be zealous in rendering his last full measure of devotion. He will not shun danger. He will not shirk his work. He will strive to be foremost in efficiency and skill. But he will put God first, and be obedient to His will and carry out His teachings wherever he is, whatever he is doing, in the army or out of it, in war as in peace.

Seventh-day Adventist noncombatants believe that in this world of sin, where war is unavoidable, they can perform the best service to their fellow men and to their country by ministering to human welfare rather than by fighting to take human life. They desire to render the very greatest service within their capacities to their fellow men and to their government, the service of saving life rather than destroying life.

In rendering this, the greatest service within their power, they will not shun danger, or refuse to go into the direct line of fire, or expose themselves to death in the accomplishment of their purposes, those of ministering to human need, of relieving human suffering, or saving human life.

The noncombatant position is not one of cowardice. It is a conviction held without any reference at all to danger or to safety. Those who hold it are entirely willing to sacrifice their own lives to aid their government, to help humanity—if that is required—while keeping within the circle of God's will. Their only refusal is to go outside that circle.

They do not refuse to die. They do not shun danger. They do not avoid the first line of action. They will go anywhere and do anything to help men. Their sole and only refusal is to disobey God. They are afraid of nothing but sin.

The noncombatant position does not lead its adherents to accept all the benefits of civil government in times of peace and refuse to aid civil government when it is in jeopardy. Noncombatants are good citizens in times of peace because they are good Christians. They are equally good citizens in times of war, ready to help

civil government in any and all noncombatant capacities, and because they continue to be good Christians in time of war they insist that their service to government then shall continue to be on the same basis as it was before—within the circle of God's will.

The noncombatant belief leads those who hold it to request their government, when it calls them to its service, to place them in those branches of the army and navy in which they will be able to render the supreme service they desire to give, that of ministering to human welfare, helping to preserve life, healing the sick, restoring the wounded, feeding and clothing their associates, rescuing the abandoned and crippled.

As inconsistent with their noncombatant belief they avoid the bearing of arms in any capacity. Agencies of destruction and weapons of warfare are not compatible with their faith; therefore they seek to help in those activities and services which are compatible.

The Seventh-day Adventist noncombatant recognizes his duty to his government and his obligation to serve it faithfully when called to do so. He believes his government is entirely within its rights when it calls for his services when they are needed, and he is ready and willing to yield it all obedience up to the giving of his life in response to its call.

But he will not disobey God. God's will with him comes first. With that single reservation he is willing to give his all and do his supreme best in the service of his government. He is not a rebellious citizen. He is not a reluctant citizen. He is the most truly loyal citizen of all. But he is, by reason of his relationship to God, ever keeping in mind the fundamental principle of Christian life—"God first—always."